MOTION FILED
DEC 11 1974
LIBRARY
SUPREME COURT, U. S

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-546

THE HONORABLE J. WILLIAM DITTER, JR.,
Petitioner,

v.

PHILADELPHIA NEWSPAPERS, INC. and SUSAN Q. STRANAHAN, UNITED STATES OF AMERICA, FREDERICK SCHIAVO,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae, The American Newspaper Publishers Association

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-546

THE HONORABLE J. WILLIAM DITTER, JR.,
Petitioner,

v.

PHILADELPHIA NEWSPAPERS, INC. and SUSAN Q. STRANAHAN, UNITED STATES OF AMERICA, FREDERICK SCHIAVO,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Newspaper Publishers Association (hereinafter "ANPA") respectfully moves this Court for leave to file the accompanying Brief Amicus Curiae in opposition to the Petition for Writ of Certiorari filed herein. The consents of the attorney for the Petitioner and of the attorneys for Respondents Philadelphia Newspapers, Inc., Susan Q. Stranahan, and the United States of America have been obtained, but the attorney for Respondent Frederick Schiavo has failed to respond to the ANPA's request for consent to the filing of a brief amicus curiae by the ANPA.

The American Newspaper Publishers Association is a non-profit membership corporation organized and existing under the laws of the Commonwealth of Virginia. Its membership consists of approximately 1,140 daily newspapers and represents more than ninety percent of the total daily and Sunday newspaper circulation in the United States. The Philadelphia *Inquirer* and seventy-nine other newspapers located throughout Pennsylvania hold membership in the ANPA.

The Association concerns itself with matters of general significance to the daily newspaper publishing business and to the profession of journalism. In that regard, the ANPA acts as a clearinghouse of information for its members by disseminating bulletins and research reports on all significant phases and developments of the newspaper business. Frequently, ANPA has taken positions on public matters which affect the interests of its members.

The Association's member newspapers, individually and through the ANPA, are ever vigilant to protect the public's right under the First Amendment to information concerning the activities of government and matters of public interest. The increasing frequency with which trial courts throughout the nation have been issuing orders aimed at restricting the content of news reports concerning criminal trials [1] has been, and continues to be, of great concern to the ANPA and its membership.

Through a brief amicus curiae submitted in support of the appeal and petition of Philadelphia Newspapers,

---

[1] *See* Graham, *Gagging the Press in the Courtroom*, The Washington Post, Nov. 17, 1974, at C3.

Inc. and Susan Q. Stranahan below, the ANPA urged the Court of Appeals to vacate the order of the District Court. The Association argued that the District Court's order constituted an invalid prior restraint on publication which resulted from a misconception of the teaching of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1964). Although the Court of Appeals, sitting en banc, did reverse the trial court's order, it did so on procedural grounds. In his Petition for a Writ of Certiorari, the petitioner not only attacks the decision of the Court of Appeals; he also asserts that the Court substantially decided an important question of federal law which has not been settled by this Court, namely the appropriate balance which must be struck between the free press guarantee of the First Amendment and the fair trial guarantee of the Sixth Amendment.

As a representative of over ninety percent of the daily and Sunday newspapers published in the nation, and because of its interest in assuring an unfettered press, the ANPA wishes to briefly set forth its views on this latter issue.

WHEREFORE, the American Newspaper Publishers Association respectfully requests this Court to grant this motion and permit it to file the Brief Amicus Curiae submitted herewith.

Respectfully submitted,

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae,
The American Newspaper
Publishers Association

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-546

THE HONORABLE J. WILLIAM DITTER, JR.,
Petitioner,

v.

PHILADELPHIA NEWSPAPERS, INC. and SUSAN Q. STRANAHAN, UNITED STATES OF AMERICA, FREDERICK SCHIAVO,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF AMICUS CURIAE OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION

PRELIMINARY STATEMENT

The American Newspaper Publishers Association (hereinafter "ANPA") submits this brief as amicus Curiae in support of the Brief of Respondents Philadelphia Newspapers, Inc. and Susan Q. Stranahan in Opposition to the Petition for a Writ of Certiorari.

INTEREST OF THE AMICUS CURIAE

As set forth in its motion for leave to file this brief, the ANPA and its member newspapers have a signi-

ficant concern for insuring that the First Amendment's guarantee of a free press shall not be abridged. The order of the District Court from which the present controversy stems was a serious breach of the limits set forth in the First Amendment to prevent the government from interfering with the free flow of information guaranteed by that Amendment. Because of the importance of this issue as it relates to the question sought to be placed before this Court by the Petition for a Writ of Certiorari, the ANPA desires to present to this Court, for its assistance, the Association's views in regard to the important issues involved in this proceeding.

ARGUMENT

At the outset it must be pointed out that the ANPA strongly supports and adopts the position of Respondents Philadelphia Newspapers, Inc. and Susan Q. Stranahan. We believe that their brief persuasively and accurately indicates the jurisdictional inability of Petitioner to seek review in this Court and the sensible policy determinations which make consideration of the Petition inappropriate. Further, the cases cited in Respondent's brief fully substantiate the exercise by the Court of Appeals of its supervisory powers in establishing procedural guidelines.

The Association wishes to emphasize that the judgment of the United States Court of Appeals for the Third Circuit did not substantially decide the important federal question concerning the "Free Press—Fair Trial" dichotomy. If this Court, however, is of the opinion that the free press—fair trial issue so pervaded the proceedings below as to require its consideration, your amicus wishes to set forth the ANPA's

views as to the constitutional invalidity of the trial court's silence order.

The Plurality and Concurring Opinions Below Did Not Decide the Important Constitutional Question as to the Validity of the Silence Order.

Neither the plurality opinion nor the concurring opinion in the Court of Appeals was based on a decision resolving the conflict arising from a confrontation between the fundamental constitutional guarantees of freedom of the press and the right of an accused to a fair trial. The plurality, in the exercise of the Court's supervisory powers, found the oral silence order to be procedurally deficient. The concurring judges found the order invalid inasmuch as the trial judge had failed to comply with the procedural requirements necessitated whenever First Amendment rights are involved.[2]

In both opinions it is clear that the question as to the proper balance to be struck between the guarantees of the First and Sixth Amendments was one which the judges purposefully avoided. The plurality flatly stated: "Our conclusion that this case should be reversed on procedural grounds makes resolution of the constitutional issue unnecessary." (Slip opinion at 9; citation omitted). Although the concurring opinion would have based the decision on First Amendment considerations, it also avoided the free press—fair trial question:

> Also, we should hold, in my judgment, *without intimating any view as to the constitutionality of*

[2] The plurality opinion notes that the procedures which it imposed were especially necessary when First Amendment rights were at stake (Slip opinion at 12), but it was not that issue which compelled the plurality's decision.

> *a limited silence order issued after a hearing embodying the procedural safeguards indicated,* that the order here must fall in any event because its issuance was not preceded by the type of hearing compelled by the First Amendment values at stake. (Slip opinion at 27; emphasis supplied).

Petitioner asserts that, by establishing procedural guidelines to be applied to orders such as that entered by the trial court, the Court of Appeals has "created new obstacles" and "denied trial judges an essential element" of the "power to comply with the dictates of *Sheppard* v. *Maxwell,*" 384 U.S. 333 (1964). So construing the effect of the decision, petitioner contends that the Court gave preference to the First Amendment's guarantee of a free press over the Sixth Amendment's guarantee of fair trial, and thus *did* render a decision on the constitutional question as to the balancing of the two rights.

If the Petitioner's characterization of the effect of the decision of the Court of Appeals were accepted, it might appear that the constitutional question *had* been decided. However, Petitioner's characterizations are unwarranted. By no stretch of the imagination can it be said that the procedural rules imposed by the Court of Appeals deny to trial judges the *power* to issue silence orders. Those rules may create "obstacles" to the issuance of such orders, but such "obstacles" have long been recognized as essential when First Amendment considerations are involved. *See, e.g., Carroll* v. *Commissioners of Princess Anne,* 393 U.S. 175 (1968); *Freedman* v. *Maryland,* 380 U.S. 51 (1965).

In light of the expressed intent of the Court of Appeals to avoid consideration of the constitutional issue and the obvious necessity for its imposition of proce-

dural safeguards, there can be no question that the Court's decision was not based on the resolution of an important federal question.

Review of the Decision of the Court of Appeals Would Require a Finding That the Trial Court's Order Was An Unconstitutional Prior Restraint on the Press.

Although, as your amicus has indicated above, the ANPA does not believe that the decision of the Court of Appeals resolved the important free press — fair trial question, the ANPA is concerned that the decision may be misapplied by other courts in the future. For this reason, your amicus respectfully suggests that, if this Court should grant the petition for certiorari, review should be had of the fundamental constitutional issue as to whether a trial court may ever issue a silence order which restricts the freedom of the press. If such a review were to be granted, the ANPA believes that the answer to this question would have to be in the negative.

Despite the clear statements by the Court of Appeals that it was avoiding resolution of the free press — fair trial issue, the fact that it was concern over that issue which prompted the trial court to enter the silence order will not be ignored by courts and attorneys in the future. The argument will surely be made that the Court of Appeals, by imposing the procedural safeguards which it did, implicitly recognized the ability of a trial judge to restrict the coverage and/or the content of news reports by the press. An order such as that issued by the trial court in this case, however, is clearly an unwarranted intrusion on what the press may publish about an ongoing criminal trial, representing a flagrant prior restraint on the publication of matters of public record and concern.

Previous restraints on the publication of information come before the courts with a heavy presumption of invalidity. *New York Times Co.* v. *United States*, 403 U.S. 713 (1971). That presumption attaches to any order such as that issued by the trial court below. Petitioner asserts that: "Unlike prior restraints against the media's criticism of government, for example, there is simply no discernible vindication of the First Amendment to be found in respondents' conduct." (Petitioner's Brief at 14). This statement flies in the face of the long line of decisions emanating from this Court regarding efforts to restrict and punish press comment in regard to judicial proceedings. *E.g., Craig* v. *Harney*, 331 U.S. 367 (1947); *Pennekamp* v. *Florida*, 328 U.S. 331 (1946); *Bridges* v. *California*, 314 U.S. 252 (1941). In *Sheppard* v. *Maxwell*, *supra*, this Court recognized that publicity can have a prejudicial effect in the context of a criminal trial; nevertheless, recognizing the important role which the press plays, the Court refused to consider restrictions on the freedom of the press as a legitimate means of preventing prejudice:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especally in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. This Court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media . . . 384 U.S. at 350.

If the trial court believed that publication of information concerning indictments pending against Mr. Schiavo elsewhere possibly jeopardized the defendant's right to a fair trial, there were alternative remedies available other than the drastic censorship order which the court issued. The court could have sequestered the jury or further cautioned the jury. Such measures were suggested by this Court in *Sheppard,* and the Committee on the Operation of the Jury System has stressed that such techniques should be more liberally utilized by the courts. *Report of the Committee on the Operation of the Jury System on the "Free Press — Fair Trial" Issue,* 45 F.R.D. 391, 412-13 (1969). That Committee also expressly condemned the use of court orders to silence the press. 45 F.R.D. at 401-02.

Freedom of the press as guaranteed by the First Amendment and fair trials as guaranteed by the Sixth Amendment are fundamental rights in our constitutional system; neither may be allowed to take precedence over the other. For that reason, fear of the possible prejudicial effects of news coverage of a criminal proceeding must never be allowed to lead to suppression of the press in the exercise of that institution's right and duty to transmit information to the public. If this Court should grant a review of the decision of the Court of Appeals, the ANPA would earnestly suggest that this Court strongly affirm that basic tenet of constitutional jurisprudence.

CONCLUSION

It is respectfully urged that this Court deny the petition for certiorari for the reasons previously stated. Should this Court, however, decide to review the opin-

ion below, your amicus suggests that primary consideration should be given to the Free Press — Fair Trial issue.

Respectfully submitted,

ARTHUR B. HANSON
W. FRANK STICKLE, JR.
888 Seventeenth Street, N.W.
Washington, D. C. 20006
(202) 298-6161

Attorneys for Amicus Curiae,
The American Newspaper
Publishers Association